No. 82-1188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT KERREY, Governor of Nebraska, et al.,
Appellants,

—vs.—

WOMEN'S SERVICES, P.C., et al.,
Appellees.

ROBERT KERREY, Governor of Nebraska, et al.,
Appellants,

—vs.—

LADIES CENTER, NEBRASKA, INC., et al.,
Appellees.

ROBERT KERREY, Governor of Nebraska, et al.,
Appellants,

—vs.—

WOMEN'S SERVICES, P.C., et al.,
Appellees.

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

1. Whether this Court's decision in H.L. v. Matheson, 450 U.S. 398 (1981), governs the appropriate standard of review for abortion-specific statutes which apply to adult women.

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INTRODUCTION

The Appellee above named respectfully moves, pursuant to Supreme Court Rule 16.1(c), that the Court affirm the judgment below because the question presented is so unsubstantial as not to need further argument. The judgment of the Court of Appeals for the Eighth Circuit is also subject to affirmance because it is manifestly correct under controlling principles of law.

OPINIONS BELOW

(See Jurisdictional Statement of Appellant, Robert Kerrey)

JURISDICTION

(See Jurisdictional Statement of Appellant, Robert Kerrey)

STATUTORY PROVISIONS

Neb. Rev. Stat. §§28-326(8)(a); 28-327; and 28-343.

The pertinent text of the above cited statutes are reprinted in the Appendix to the Jurisdictional Statement (App. 64-74[1]).

STATEMENT OF THE CASE

The relevant facts are set out in the opinions below, which are reprinted in the Appendix to the Jurisdictional Statement and in Appellant's Procedural Overview (J.S. 3-6[2]). Appellant's

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[1] Citations in this form refer to the Appendix to the Jurisdictional Statement filed herein.

[2] Citations in this form refer to the Jurisdictional Statement.

Statement of the Facts (J.S. 6-8), however, is irrelevant, since the issue presented by this appeal is not the manner in which the District Court weighed evidence presented by Appellants at the trial on the nature of the state's interest in enacting the challenged legislation, but whether H.L. v. Matheson, 450 U.S. 398 (1981), is controlling on the issue of the appropriate standard of review for abortion-specific legislation applicable to adult women.

ARGUMENT

1. The judgment of the Court of Appeals for the Eighth Circuit should be affirmed because the question presented is so unsubstantial as not to need further argument.

This Court's remand to the Eighth Circuit "for further consideration in light of H.L. v. Matheson" (App. 74)

clearly refers to the striking down of the Nebraska parental consultation requirement, Neb. Rev. Stat. §§28-333 and 334. (App. 68-69).[3] The remand had no bearing on the lower courts' decisions regarding the informed consent, waiting period and reporting provisions, all of which apply to adult women. Neb. Rev. Stat. §§28-326(8)(a); 327 and 343. (App. 66-67, 71-73). In H.L. v. Matheson, 450 U.S. 398 (1981), this Court upheld as constitutional a Utah statute requiring prior parental notification for minors seeking abortions, but only as applied to immature, dependent minors. Id. at 409. H.L. left unanswered whether

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[3] Prior to trial, the district court had granted plaintiffs' motion for partial summary judgment, finding unconstitutional the parental consultation requirement. (App. 59-60).

such a requirement would be constitutional if applied to a broader class of minors, since no other kinds of minors had challenged the statute. Id. at 406-07. Indeed, this Court implied that a notification requirement applicable to mature minors, minors with emergency health care needs, or minors with hostile home situations, would present serious constitutional questions. Id. at 406-07, n. 14.

The original plaintiffs in the instant case did not explicitly include minors, the named women plaintiffs having been certified to represent a class of all women in Nebraska seeking abortions. (App. 6). Thus, under H.L., they did not have standing to challenge the parental consultation requirement on the ground that it violated the constitutional rights of mature or "best inter-

ests" minors. The district court responded to this concern on remand by allowing the intervention of two minor plaintiffs, Jane Roe I and Jane Roe II, to represent the interests of mature and "best interests" minors.[4/] The district court then held that insofar as the parental consultation requirement on its face applied to all minors, and that no provision had been made for alternative court procedures, it was unconstitutional, citing Bellotti v. Baird, 443 U.S. 662 (1979) and Planned Parenthood Association of Kansas City v. Ashcroft, 655 F.2d 848 (8th Cir. 1981),

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[4/] The district court also allowed the doctor-plaintiffs to amend their complaints to add allegations that their patients included mature and "best interests" minors. (App. 77).

664 F.2d 687 (8th Cir. 1982) (supplemental opinion), cert. granted, 50 U.S.L.W. 3934 (U.S. May 24, 1982) (Nos. 81-1255, 81-1623). (App. 79-80).

Contrary to Appellants' assertion, the Eighth Circuit did not disagree with the district court's implicit holding that H.L. had no effect on the standard of review to be applied to the informed consent, waiting period and reporting provisions. Indeed, the Eighth Circuit's citation of Ashcroft, 655 F.2d 848 (1981), in support of its affirmance confirms this conclusion. Ashcroft, which struck down a similar parental notice provision, nowhere intimates that H.L. controls the standard by which courts must review abortion legislation applicable to adult women. 655 F.2d at 857-60.

It is clear that this Court's

vacatur and remand "in light of H.L. v. Matheson" constituted a direction to the lower court to reexamine the standing of the women plaintiffs to raise certain challenges to the parental consultation requirement. Only if the women plaintiffs were found to have such standing, would the district court then be free to rule on the constitutionality of the parental consultation section, in light of the principles enunciated in H.L. and Bellotti v. Baird, 443 U.S. 622 (1979). The lower courts' response to this Court's direction was entirely appropriate.

2. The lower courts were correct in holding unconstitutional the informed consent, waiting period and reporting requirements, under a standard of strict judicial scrutiny.

This Court has consistently applied

the compelling state interest test established in Roe v. Wade, 410 U.S. 113 (1973). That case held that the "right to privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id. at 153. State interference with fundamental rights can be justified only by a "compelling state interest," and a showing that the regulations are narrowly drawn to serve those interests. Id. at 155.[5/] Those state interests are (1) protecting the health of the pregnant

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[5/] Regulations applicable to first trimester abortions are almost always invalid, since no compelling state interest exists at that stage. Doe v. Bolton, 410 U.S. 179, 195 (1973). Connecticut v. Menillo, 423 U.S. 9, 11 (1975) under-

woman, which does not become "compelling" until the second trimester of pregnancy and (2) protecting potential life, which does not become "compelling" until the fetus is considered by the physician to be viable. Id. at 162-163. Therefore,

> for the period of pregnancy prior to this 'compelling' point, the attending physician in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State. Id. at 163.

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scored that first trimester regulations which "restrict" abortion are permissible only if they insure the existence of medical standards which underlie the finding in Roe of the safety of first trimester abortions.

This Court has reaffirmed the Roe formulation in subsequent decisions; legislation which interferes directly with the abortion right is subject to strict scrutiny. Such laws are unconstitutional if they are not narrowly drawn to serve one of the compelling state interests set forth in Roe.[6/] For instance, Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) struck down a statutory prohibition against the use of saline amniocentesis as an abortion technique after the first

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6/ Laws impinging on fundamental rights are "presumptively unconstitutional" Harris v. McRae, 448 U.S. 297, 312 (1980). Once plaintiffs show the requisite degree of interference, defendants bear the burden of proving the law is narrowly tailored to further a compelling state interest. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 76-77 (1976); Doe v. Bolton, 410 U.S. at 195.

12 weeks of pregnancy. This Court found that it did not promote the state's interest in maternal health because abortion by that method was still safer than childbirth, and alternative abortion methods were not yet widely available. This Court further found that the requirement was not narrowly drawn, since other, more dangerous methods were not prohibited. Id. at 76-77. See also Colautti v. Franklin, 439 U.S. 379 (1979); Carey v. Population Services International, 431 U.S. 678-686 (1977).[7/]

[7/] Strict scrutiny analysis need not be employed when a regulation causes no significant burden. The Danforth Court upheld a recordkeeping requirement because it had "no legally significant impact or consequence on the abortion decision." 428 U.S. at 80-81. Similarly, an informed consent requirement, which did not specify the content of the physicians' speech, was found not to interfere with the abortion decision, Id. at 77. The recordkeeping, informed consent and

This Court's rulings on the privacy rights of minors do not undermine the strict scrutiny standard. Bellotti v. Baird, 443 U.S. 622, 633 (1979) recognized that "the status of minors under the law is unique in many respects." Thus, "the State has somewhat broader authority to regulate the activities of children than of adults," Planned Parenthood of Central Missouri v. Danforth, 428 U.S. at 74-75, because there are state interests at stake which are not present in the case of adults.

H.L. v. Matheson illustrates this Court's recognition that there are legitimate state interests with regard to

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waiting period requirements in the instant case are not of the Danforth ilk. The district court found that all three imposed very real burdens on women seeking abortions. (App. 39-54).

minors which do not exist in relation to adults. The Utah statute, this Court noted, served the "important considerations of family integrity and protecting adolescents . . ." id. at 411, and it was on this basis that the statute was upheld. Id. at 413. Nothing in H.L. v. Matheson, or indeed in any of the Court's decisions with regard to minors' privacy rights, undermines the basic principle of strict judicial review for abortion-specific legislation established in Roe v. Wade.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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